NO. 44314-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARGIE L. DERENOFF
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Brooke Taylor, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

A. ASSIGNMENTS OF ERROR

1. Ms. Derenoff assigns error to the trial court's conclusion of law no 2 that she presents a threat to public safety and to her own safety.

2. The trial court erred in revoking her conditional release when she was not competent to assist her attorney during that proceeding.

3. Ms. Derenoff was denied her due process right to counsel when she was unable to assist due to mental illness.

4. Ms. Deneroff was denied her right to confront witnesses when the trial court permitted as substantive evidence a report in lieu of live testimony.

Issues Presented on Appeal

1. Did the state prove that Ms. Derenoff presents a threat to public safety and to her own safety?

2. Did the trial court erred in revoking Ms. Derenoff's conditional release when she was not competent to assist her attorney during that proceeding?

3. Was denied Ms. Derenoff denied her due process right to

counsel when she was unable to assist due to mental illness?

4. Was Ms. Deneroff denied her right to confront witnesses when the trial court permitted as substantive evidence a report in lieu of live testimony?

B. STATEMENT OF THE CASE

Ms. Derenoff was acquitted of assault in the third degree by reason of insanity and conditionally released from Western State. CP 13, 89, 91; Supplemental CP Order of Conditional Release (October 21, 2010). After some time Ms. Derenoff decompensated and the state sought to revoke her conditional release and obtain commitment at Western State. RP 29, 56; CP 56, 70. At the time of the revocation hearing, Ms. Derenoff was not competent. CP 13; RP 65, 67-68. During the revocation hearing, counsel for Ms. Derenoff stated that based on the evidence, Ms. Derenoff violated the conditions of release by refusing treatment and failing to maintain contact with her community custody officer. RP 93-95. Regardless of whether it was appropriate for trial counsel to make this concession, a report from the Community Custody Officer stated that Ms. Derenoff's mental condition deteriorated and she failed to report. RP 65, 67-68.

The trial court ruled that Ms. Derenoff need not be competent to proceed with revocation. RP 75. The trial court did not enter a written order

to this effect.

> All right. First, I think the competency issue has already been determined, but I have reviewed it myself. I do agree with Judge Williams, there is no due process right to be competent at this hearing

The trial court relied on RCW 10.77,190(4), to revoke Ms. Derenoff's conditions of release. RP 77-78; CP 17. Defense counsel objected to the proceeding because Ms. Derenoff was not competent to assist her attorney. RP 62.

> Counsel objected to hearsay in lieu of live testimony. RP 76-77.
>
> Hearsay In Lieu of Live Testimony.
>
> I do find there is good cause to admit that report in lieu of live testimony for a number of reasons. Number 1, the Court is very, very familiar with the staff, the processes, the reports generated by Western State hospital, we rely on them on almost a daily basis, uh, without the benefit of live testimony. There is certainly indicia of reliability in these reports. As I indicated, the Court has come to rely upon the opinions of the experts at Western State Hospital in precisely these kinds of situations. logistically challenging to get Dr. Hendrickson or one of his colleagues to get her and provide live testimony. I think it's safe to assume that were that to happen, what we'd get is a verbal recitation of what is written in the report and get the same recommendations. Yes, it would be subject to cross examination but that would be of minimal benefit to the Court in these circumstances. Finally, it would consume a great deal more time which means Ms. Derenoff remains in jail and that is not something I want to see happen. If I were to keep the report out at this point now, we would be looking at a hearing after the first of the year during which time she would continue to languish in a correction facility

> rather than a treatment facility. I think it is to her benefit to have this hearing this morning and get on with this and, uh, for those reasons I will admit the report…

RP 76-77

C. ARGUMENT

1. MS DERENOFF''S DUE PROCESS RIGHTS WERE VIOLATED WHEN DURING A HEARING IN WHICH SHE WAS NOT COMPETENT, THE TRIAL COURT REVOKED THE LEAST RESTICTIVE ALTERNATIVE THAT WAS IMPOSED FOLLOWING HER ACQUITTAL BY REASON OF INSANITY

Following a revocation hearing in which Margie Derenoff was indisputably incompetent, the trial court nonetheless revoked Ms. Derenoff's least restrictive alternative to hospitalization under RCW 10.77.190. CP 29, 89, 118. Defense counsel objected on grounds that he could not represent Ms. Derenoff due to her inability to assist. The issues on appeal are: (1) whether Ms. Derenoff was denied her due process right to counsel due to her incompetence; (2) whether this invalidates the revocation; and (3) whether Ms. Derenoff's confrontation clause rights were violated by the trial court's exclusive reliance on hearsay.

The trial court proceeded to revoke the conditional release under RCW 10.77.190(4) which provides as follows:

> (4) The court, upon receiving notification of the apprehension, shall promptly schedule a hearing. The issue to be determined is whether the conditionally released person did or did not adhere to the terms and conditions of his or her release, **or** whether the person presents a threat to public safety. Pursuant to the determination of the court upon such hearing, the conditionally released person shall either continue to be conditionally released on the same or modified conditions or his or her conditional release shall be revoked and he or she shall be committed subject to release only in accordance with provisions of this chapter.

(emphasis added).

Contrary to the statute, the trial court order imposing conditional release, required the state to prove that Ms. Derenoff both failed to comply with the conditions **and** that she posed a danger to self and others. Supp. CP Order of Conditional Release (October 21, 2010).

RCW 10.77.020(1) provides in relevant part that a person subject to any provision of RCW 10.77 is entitled to counsel at the revocation hearing. RCW 10.77.020; *State v. Reid*, 144 Wn.2d 621, 637, 30 P.3d 465 (2001):

> At any and all stages of the proceedings pursuant to this chapter, any person subject to the provisions of this chapter **shall be entitled to the assistance of counsel,** and if the person is indigent the court shall appoint counsel to assist him or her. A person may waive his or her right to counsel; but such waiver shall only be effective if a court makes a specific finding that he or she is or was competent to so waive. In making such findings, the court shall be guided but not

> limited by the following standards: Whether the person attempting to waive the assistance of counsel, does so understanding:
> RCW 10.77.020(1) (Emphasis added).

In this case, Ms. Derenoff was entitled to counsel at her RCW 10.77.190, .200 revocation hearing. Moreover, the state had burden of proving the insanity acquittee's violation of terms and conditions of conditional release, as grounds for revocation, by preponderance of evidence. *State v. Bao Dinh Dang* 168 Wn.App. 480, 280 P.3d 1118, *review granted* 175 Wn.2d 1023, 291 P.3d 253 (2012).

Questions of law, including the guaranty of constitutional due process, are reviewed de novo. *Morgan,* 161 Wn.App. at 77-78, citing, *In re Det. of Fair,* 167 Wn.2d 357, 362, 219 P.3d 89 (2009), citing *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n,* 149 Wn.2d 17, 24, 65 P.3d 319 (2003). "[D]ue process guaranties must accompany involuntary commitment for mental disorders.". *In re Harris,* 98 Wn.2d 276, 279, 654 P.2d 109 (1982) Procedures of competency under ch. 10.77 are mandatory and not merely directory. *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982).

Like commitment for the cranially insane, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct.

1804, 60 L.Ed.2d 323 (1979); *see also*

The Fourteenth Amendment and Washington State constitution protect persons from the deprivation of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. Freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80, 118 L.Ed.2d 437, 112 S.Ct. 1780 (1992). Washington law affords greater protection by providing that "[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." *State v. Fleming*, 140 Wn.2d 853, 862, 16 P.3d 610 (2001), quoting, RCW 10. 77.050.

"The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." *Foucha,* 504 U.S. at 79 (quoting *Vitek v. Jones*, 445 U.S. 480, 492, 100 S.Ct. 1254, 53 L.Ed.2d 522 (1980)). "Commitment to a mental hospital produces a 'massive curtailment of liberty' . . . and in consequence 'requires due process protection.'" Vitek, 445 U.S. at 491-92. (internal citations omitted); *accord In re Detention of Albrecht,* 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Because of the fundamental liberty interest at stake, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Foucha*, 504 U.S. at 80) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)).

The right to be competent ensures that the defendant is not tried "in absentia," *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) , or relegated "to the role of a mere spectator, with no power to attempt to affect the outcome." *Allen,* 187 P.3d at 1037. The fact that an incompetent defendant is assisted by counsel does not mitigate the risk of an erroneous deprivation of liberty. By definition, a mentally incompetent defendant, lacks a rational and factual understanding of the proceedings against him, as well as the ability to assist counsel in any meaningful way. Revocation of an incompetent person's liberty is thus de facto unfair.

RCW 10.77 operates within the criminal justice system, thus principles of due process apply as in a criminal case and forbid the revocation of conditions of release of a person lacking a rational and factual understanding of the proceedings and sufficient ability to consult with her lawyer and assist in preparing her defense. *State v. Klein*, 156 Wn.2d 103,

119, 121, 124 P.3d 644 (2005) (distinguishing civil commitment from criminal insanity commitment); *State v. C.B.,* 165 Wn. App. 88, 265 P.3d 951 (2011); RCW 10.77.110., 120; *Drope*, 420 U.S. at 171.

In *Drope*, the Court noted the historical antecedents for this rule and its elemental link to the right to a defense: "Some have viewed the common law prohibition 'as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.'" Id. (citation omitted). For this reason, the standard focuses on the defendant's "'capacity . . . to consult with counsel" and . . . "to assist counsel in preparing his . . . defense.'" *Indiana v. Edwards*, 554 U.S. 164, 174, 128 S.Ct. 2379, 2386, 171 L.Ed.2d 345 (2008) (quoting *Drope*, 420 U.S. at 171).

> [I]t would be likewise a reproach to justice and our institutions, if a human being ... were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity.

Cooper v. Oklahoma, 517 U.S. 348, 366, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (quoting *United States v. Chisholm*, 149 F. 284, 288 (C.C. Ala. 1906)).

As noted above, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. at 426 (emphasis added). Moreover, "the function of legal process is to minimize the risk of erroneous decisions." Id. (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

As the Court explained in *Cooper,* an incompetent defendant, who "lacks the ability to communicate effectively with counsel . . . may be unable to exercise other 'rights deemed essential to a fair trial.'" *Cooper*, 517 U.S. at 363 (quoting *Riggins v. Nevada*, 504 U.S. 127, 139, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring in judgment)).

> With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a "fundamental component of our criminal justice system"--the basic fairness of the trial itself.

Id. at 364 (internal citation omitted). The Court concluded that "[t]he deep roots and fundamental character of the defendant's right not to stand trial

when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection." *Id.* at 368. RCW 10.77 is a function of the criminal justice system. RCW 10.77.110, 120.

The Legislature in drafting and passing RCW 10.77. 020 determined that persons subject to RCW 10.77 (the criminally insane) are entitled to the due process protection of counsel. RCW 10. 77.010, .020, 050. This means the ability to assist counsel because like a trial, or sentencing, the revocation of Ms. Derenoff's conditional release in this case was analogous to a sentence that deprived Ms. Derenoff of her liberty. *Drope* , 420 U.S. at 171.

Here, the trial court erroneously believed that contrary to due process, Ms. Derenoff did not need to be competent at her revocation hearing. The decision in *Cooper* however makes clear, that due process applies to a de facto commitment hearing. "[T]he defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system." *Id.* at 367. Here the revocation was part of the administration of the criminal justice system in which the trial court violated due process and Ms. Derenoff's right to defend herself. RCW 10. 77.010, .020, 050, .110, .120, .190, 200.

By contrast, in *State v. Morgan*, 161 Wn.App. 66, 253 P.3d 394, *review granted*, 300 P.3d 415 (April 30, 2013), the Court of Appeals held that under the plain language of RCW 71.09.020, (SVP commitment) the civil committee does not have a righto be competent at the SVP proceedings. *Morgan,* 161 Wn.App. at 81. The Court in *Morgan* however distinguished the right to be competent during proceedings under RCW 10.77.050 from a commitment under RCW 10.77 ("No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues."). *Morgan,* 161 Wn.App. at 81.

Under RCW 10.77.020, because the revocation in this case proceeded under title 10. 77., Ms. Derenoff was entitled to counsel which includes the right to be able to assist her attorney. Ms. Derenoff was not competent during the hearing, and the state failed to prove as required by the trial court order of conditional release, that Ms. Derenoff was a danger to self or others. There is nothing in the record to support the assertion that Ms. Derenoff posed a threat to public safety. The CCO did not testify that Ms. Dernenoff was dangerous to herself or others and her history does not support a finding of dangerousness. RP 78-87.

For these reasons, the order revoking Ms. Derenoff's conditional release should be reversed.

2. MS. DERENOFF'S DUE PROCESS RIGHTS TO CONFRONTATION WERE VIOLATED WHEN DURING A HEARING IN WHICH SHE WAS NOT COMPETENT, THE TRIAL COURT REVOKED THE LEAST RESTICTIVE ALTERNATIVE BASED ON THE WRITTEN REPORT OF A DOCTOR IN LIEU OF LIVE TESTMIONY.

To revoke Ms. Derenoff's least restrictive alternative, the trial court relied exclusively on the report of Dr. Hendrickson from Western State. RP 61, 67-68, 76-78; Ex 1. Dr. Hendrickson did not testify at the revocation hearing. RP 77-78. Defense counsel objected to the trial court's reliance on hearsay to revoke Ms. Deneroff's conditional release. RP 72-73.

In *State v. Abd-Rahmaan*, 154 Wn2d 280, 286, 111P.3d 1157 (2005), the Supreme Court reversed the Court of Appeals decision permitting written reports in lieu of live testimony at a sentence modification hearing where the state did not pr3sent sufficient evidence to support a good cause finding that *Abd-Rahmaan*'s confrontation rights could be violated. *Abd-Rahmaan*, 154 Wn2d at 290-291. *Abd-Rahmaan*, 154 Wn2d at 290-291.

The Court explained that "good cause" could only be established by: (1) demonstrating that the hearsay evidence was reliable; (2) that it would be difficult to obtain the in-court appearance of the witness; and (3) that obtaining the in-court appearance of the witness was cost prohibitive. Id.

Each of these factors must be established to permit the introduction of hearsay at a revocation hearing. *State v. Dahl*, 139 Wn.2d 678, 686, 990 P.2d 396 (1999). The Supreme Court reversed the order in *Abd-Rahmaan* because there was no evidence in the record that the hearsay was reliable or that the live appearance of the witness was difficult or cost prohibitive. *Abd-Rahmaan*, 154 Wn2d at 290-291.

Similarly in *Dahl*, the Supreme Court held that Dahl was denied his due process right to confront the witnesses against him at his revocation hearing where the trial court permitted a CCO report based on a report from two girls that Dahl exposed himself without making an independent determination of the reliability of the allegations. *Dahl*, 139 Wn.2d at, 686. The Court held that under the "good cause" standard, the state failed to show that it would have been difficult or expensive to obtain the girls' presence and there was no information regarding their reliability. Thus the CCO report should not have been admitted. Id.

Here the trial court mistakenly believed that cross examination was for the Court's benefit, not Ms. Derenoff's and that she was not entitled to cross examine witnesses. While the trialcourt stated that it would be difficult and expensive to obtain Dr. Hendricksen, a Western State employee, the record does not support this finding. RP 76-77. Under *Abd-Rahmaan* and

Dahl, the trial court did not find good cause to permit hearsay in lieu of live testimony, rather the trial court speculated " I think it's safe to assume that " if Dr. Hendrickson testified what "we'd get is a verbal recitation of what is written in the report and get the same recommendations. ". RP 76-77. The trial court also stated it would "consume a great deal more time "to have live testimony, but again this is not a criteria under *Dahl* .

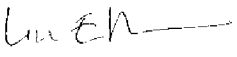
Here, not only did the trial court fail to protect Ms. Derenoff's right to confrontation, it misapplied the standard enunciated in *Abd-Rahmaan*. In this case, according to *Abd-Rahmaan* and *Dalh,* under the "good cause" standard, the state failed to show that it would have been difficult or expensive to obtain Dr. Hendrickson's presence.

D. CONCLUSION

Ms. Derenoff respectfully requests this Court reverse the order of revocation of her least restrictive alternative sentence for violation of her right to confront witnesses and for violation of her right to assist her attorney during a proceeding in which she lost her liberty.

DATED this 11th day of June 2013.

Respectfully submitted,



_____
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I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office kcpa@co.kitsap.wa.us and Margie Deneroff 112 N. Peabody St. #2 Port Angeles, WA 98362 9901 a true copy of the document to which this certificate is affixed on June 11, 2013. Service was made by electronically to the prosecutor and to Mr. Carter by depositing in the mails of the United States of America, properly stamped and addressed.

Lise Ellner

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